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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GARY T. DIXON, Warden, Central Prison, Raleigh, North Carolina, and LACY H. THORNBURG, Attorney General of the State of North Carolina,

Petitioners,

vs.

DOUGLAS WILLIAMS, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that certiorari is necessary in this case in order to provide proper guidance on the second exception to *Teague* v. *Lane*. Loose application of that exception threatens to undermine the rule.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate

in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

Collateral attacks on final judgments based on subsequent changes in the law are fundamentally unfair to the people for the same reason that *ex post facto* laws are unfair to individuals. Allowing such attacks in the absence of a substantial risk of an actual miscarriage of justice is contrary to the interests CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

October, 1992

Respectfully submitted,

KENT S. SCHEIDEGGER

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Criminal Justice Legal Foundation

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Teague v. *Lane* was a major reform in the law of habeas corpus. It protected the people against unfair *ex post facto* abrogation of judgments which were legal when entered, subject to two narrow exceptions. To preserve the vitality of this reform, the exceptions must be kept narrow.

The second exception has caused confusion in the lower courts, and better guidance is needed. That guidance can be found in the strong connection between this exception and the "actual innocence" exception of *Murray* v. *Carrier*. Just as *Sawyer* v. *Whitley* eliminated from the *Murray* exception all cases where the defendant is guilty and eligible for the death penalty, so should all

rules dealing only with the sentencing of death-eligible defendants be excluded from the second *Teague* exception.

ARGUMENT

I. The second *Teague* exception is the subject of great confusion in the lower courts.

A. The Teague Decision.

Teague v. *Lane*, 489 U. S. 288 (1989) was a landmark decision, taking a giant step toward restoring balance and fairness to the criminal law. The effectiveness of that reform, however, depends on its proper implementation. Decisions such as the one in the present case threaten to nullify *Teague*.

The American legal tradition has long recognized that it is fundamentally unfair to declare an act illegal when it was understood to be legal at the time it was done. Criminal statutes having such an effect are expressly prohibited by the Constitution, on both the federal and state levels. U. S. Const. art. I, § 9, cl. 3, § 10, cl. 1. Retroactive expansion of criminal statutory prohibitions by judicial interpretation has long been recognized as so fundamentally unfair as to violate due process of law. *Bouie* v. *Columbia*, 378 U. S. 347, 353-354 (1964).

Teague extends this basic principle of fairness to the people. The question on habeas corpus is not whether the trial court erred but whether the state is violating the Constitution by keeping the prisoner in prison. 28 U. S. C. § 2254. If the state obeyed the law in effect when it entered the judgment, it is fundamentally unfair to the people to declare their judgment illegal merely because the rules have since changed. See *Engle* v. *Isaac*, 456 U. S. 107, 128, n. 33 (1982).

Teague recognizes, however, that there may be circumstances where a judgment legal when entered must be declared illegal because of an overriding imperative on

the other side. For this reason, there are two *narrow* exceptions to the rule. See *Saffle* v. *Parks*, 494 U. S. 484, 487-488 (1990). The question in this case is whether the second exception will continue to be narrow, or whether it will swallow the rule.

B. Exceptions and Innocence.

Throughout the recent development of habeas corpus law, this Court has sounded two themes. First, the Court has placed limits on the writ in order to partially return to the old rule that habeas will not be used as a substitute for or repetition of the appeal. See *Sunal* v. *Large*, 332 U. S. 174, 178 (1947). To this end, limits have been placed on consideration of constitutional claims irrelevant to the accuracy of the result, *Stone* v. *Powell*, 428 U. S. 465 (1976); claims not timely raised in state court, *Engle* v. *Isaac*, *supra*; claims not raised in the first federal petition, *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991); and attempts to relitigate claims in a successive petition, *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) (plurality). At the same time, the Court has increasingly recognized the overriding imperative to correct actual miscarriages of justice, i.e. the convictions of people who are actually innocent. *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986).

Teague itself explicitly recognizes these common threads. In defining the problem as one of the scope of the writ, *Teague* relies on *Engle*, *Murray*, *Kuhlmann*, and *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). *Teague*, 489 U. S., at 308. Similarly, in setting out the exceptions, *Teague* noted that "our cases have moved in the direction of reaffirming the relevance of the *likely accuracy of convictions* in determining the available scope of habeas review," citing *Kuhlmann* and *Murray*. *Id*., at 313 (emphasis added). *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 213, 110 S. Ct. 2822, 2832-2833 (1990) ("*Sawyer I*") similarly relied on procedural default/miscarriage of justice cases in its discussion of the second *Teague* exception.

From the very beginning, then, there has been a powerful connection between the *Teague* exceptions and the "actual innocence" exception of *Murray* and *Kuhlmann*. For the first *Teague* exception, the connection is simple and obvious. A person in jail for flag burning, 18 U. S. C. § 700, would be actually innocent. See *United States* v. *Eichman*, 496 U. S. 310 (1990). A person sentenced to death for rape would be "innocent of" (i.e., ineligible for) the death penalty. *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989). This straightforward rule has caused little difficulty in the lower courts, with one appalling exception. See *Beam* v. *Paskett*, 966 F. 2d 1563 (CA9 1992), cert. pending, No. 92-464 (finding exception applicable to sane adult convicted of rape and murder of a 13-year-old girl).

The second exception, however, has created more problems. Like the first exception, it is rooted in the need to prevent an actual miscarriage of justice, defined as the conviction of an innocent person. *Teague*, 489 U. S., at 313. Unlike the first exception, however, "the precise contours of this exception" have proven "difficult to discern." *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990).

Misunderstanding of the second *Teague* exception is rampant in the courts of appeals. *Graham* v. *Hoke*, 946 F. 2d 982 (CA2 1991), cert. denied, 116 L. Ed. 2d 793, 112 S. Ct. 890 (1992) is a prime example. *Graham* held, in effect, that *any* rule which supplanted a prior rule "altered our understanding of a 'bedrock procedural element.' " *Id.*, at 994. As long as it has some accuracy-enhancing effect, it would qualify for the second exception. The "narrow" exception would therefore encompass virtually all new rules thought to enhance accuracy, and *Teague* would be a dead letter.

Graham was nonetheless decided in the state's favor under harmless error analysis. 946 F. 2d, at 997. How a violation of a rule which is an "absolute prerequisite to

fundamental fairness," *Teague*, 489 U. S., at 314, can ever be harmless error is not explained.

Hopkinson v. *Shillinger*, 888 F. 2d 1286 (CA10 1988) is similar. The Court of Appeals in that case held that the rule of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) qualified for the second exception and then proceeded to find the error did not affect the jury in that case. 888 F. 2d, at 1292, 1295. The former holding was abrogated by *Sawyer* v. *Smith*, *supra*.

The present case is both an example of the confusion and an opportunity to correct it. The Court of Appeals quotes *Sawyer* v. *Smith* out of context and announces a rule that *all* of this Court's Eighth Amendment capital sentencing rules meet the accuracy-enhancing requirement for the second *Teague* exception. *Williams* v. *Dixon*, 961 F. 2d 448, 454 (CA4 1992). The Court of Appeals then launches into a "death is different" dissertation which, if accepted, would effectively abrogate *Penry* v. *Lynaugh*, *supra*, and apply the second *Teague* exception to all penalty phase rules, something this Court explicitly refused to do in *Sawyer*, 111 L. Ed. 2d, at 212, 110 S. Ct., at 2832.

To clear up this confusion, *amicus* submits, the contours of the exception need to be more precisely defined. A statement that a rule "has none of the primacy and centrality of the rule adopted in *Gideon*," *Saffle*, *supra*, 494 U. S., at 495, provides insufficient guidance for lower courts. The proper guidance, *amicus* submits, can be found in recognition of the link between the *Teague* exceptions and the "actual innocence" rule of *Murray* v. *Carrier*.

II. Only rules essential to the prevention of miscarriages of justice qualify for the second exception.

Teague v. *Lane*, 489 U. S. 288 (1989) did not accept at face value Justice Harlan's assertion in *Desist* v. *United*

States, 394 U. S. 244, 262 (1969) (dissent) that "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." Instead, *Teague* raised the threshold, "limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is *seriously* diminished." *Id.*, at 313 (emphasis added). This limitation is fully consistent with *Teague*'s concern for preventing miscarriages of justice. If it is unlikely that trials conducted before the rule resulted in the conviction of innocent people, then the state's interest in finality outweighs the benefits, if any, of applying the rule to overturn final judgments.

The conclusion which immediately follows is obvious to any student of American criminal procedure jurisprudence. In the last decade of the twentieth century, there are few, *if any*, such rules remaining to be made. "Because we operate from the premise that such procedures would be so *central* to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge." *Ibid.* (emphasis added). This is a very cautious understatement. The firestorm that swept through criminal procedure in the 1960's and 1970's left behind very little combustible material. We now have a system so heavily weighted in defendants' favor that there are no rules of *Gideon* magnitude remaining to be made.

Gideon v. *Wainwright*, 372 U. S. 335 (1963) has been cited repeatedly as an example of the kind of rule which qualifies for the exception. *Teague*, *supra*, 489 U. S., at 311-312 (quoting *Mackey* v. *United States*, 401 U. S. 667, 694 (1971) (Harlan, J., concurring in the judgment)); *Saffle*, *supra*, 494 U. S., at 495. The reason is simple. Denial of counsel in the pre-*Gideon* era resulted in the conviction of many innocent people, including Gideon himself. Extension of the right to counsel to all felony defendants sharply reduced the number of fundamental

miscarriages of justice. The procedural requirements promulgated under the Eighth Amendment are entirely different.

In *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) ("*Sawyer II*"), this Court was confronted with the question of when a death sentence is a "miscarriage of justice" despite the facts that the defendant is actually guilty of murder, is actually eligible under state law, and is not within any of the categorical constitutional exclusions.[1] The majority said "never"; the concurrence said "almost never." The majority held that "the 'actual innocence' requirement must focus on those elements which render a defendant eligible for the death penalty . . . ." 120 L. Ed. 2d, at 585, 112 S. Ct., at 2523. The concurrence would also include those cases where *no* reasonable sentencer would have imposed the death penalty. *Id.*, at 120 L. Ed. 2d, at 301, 112 S. Ct., at 2536 (citing *Jackson* v. *Virginia*, 443 U. S. 307, 316-318 (1979)).

Of all the *procedural* rules promulgated under the Eighth Amendment after *Gregg* v. *Georgia*, 428 U. S. 153 (1976) and its companion cases,[2] which ones constitute rules the nonobservance of which is *highly likely* to result in a miscarriage of justice? The answer, *amicus* submits, is *none*. The categorical exclusion rules, which qualify for the first exception under *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) take care of all of the ineligibility cases which the *Sawyer II* majority considered to be miscarriages of justice. Even if one accepts the view of the *Sawyer II* concurrence, that a miscarriage of justice would be possible despite

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1. See *Enmund* v. *Florida*, 458 U. S. 782 (1982) (felony murder accomplice with no intent to kill); *Coker* v. *Georgia*, 433 U. S. 584 (1977) (rape, not murder); *Ford* v. *Wainwright*, 477 U. S. 399 (1986) (insane at time of execution); *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988) (juvenile, no statutory minimum age).

2. We need not consider here categorical exclusions, which qualify under *Penry*, or the retroactivity of *Gregg* itself and its companion cases, which is a moot question.

eligibility, such a case would necessarily be extremely rare. Sandra Lockett would now be excluded by the rule of *Enmund*, *supra*. See *Lockett* v. *Ohio*, 438 U. S. 586, 589-591 (1978). Monty Eddings would now be excluded by the rule of *Thompson*, *supra*. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 105 (1982). None of this Court's other Eighth Amendment procedure cases presents facts on which *no* reasonable sentencer could find death to be the appropriate penalty, and indeed it is highly questionable whether the *Lockett* and *Eddings* cases are that clear.

At best, all of the post-*Gregg* procedural cases fit *Sawyer I*'s description of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). They are protections of some value and are thought to enhance accuracy of capital proceedings. However, they are layered on top of a foundation of due process protections which apply to capital and noncapital cases alike. They are also layered on top of the basic structure of *Gregg*, *Furman* v. *Georgia*, 408 U. S. 238 (1972), and *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), which established the basic system of guided discretion we have today.

None of the post-*Gregg* procedural rules are "watershed rules of criminal procedure." See *Teague*, 489 U. S., at 311. None are "central to an accurate determination of innocence or guilt." See *id.*, at 313. None are essential to "the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction. . . ." *Id.*, at 315.

III. The *McKoy* rule is not essential to prevent miscarriages of justice.

The critical question is whether the rule of *McKoy* v. *North Carolina*, 494 U. S. 433 (1990) is an "absolute prerequisite to fundamental fairness." *Teague* v. *Lane*, 489 U. S. 288, 314 (1989). Is the *McKoy* rule "so central to an accurate determination of innocence or guilt" that

under the earlier North Carolina practice "the likelihood of an accurate conviction [was] seriously diminished"? *Id.*, at 313.

Translating "actual innocence" into the penalty phase as the *Sawyer II* majority did, the answer is simply and clearly no. Once a defendant has been found guilty of murder and eligible for a death sentence, the propriety of that sentence is a matter of opinion, and its imposition is never a miscarriage of justice.

Using the *Sawyer II* concurrence's approach requires a bit more analysis, but it yields the same result. The *McKoy* majority was concerned that "[t]he unanimity requirement thus allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a ' "sentence less than death." ' " 494 U. S., at 439. How likely is this scenario in a case where "in view of all of the evidence, mitigating circumstances so far outweighed aggravating circumstances that *no reasonable sentencer* would have imposed the death penalty"? See *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 301, 112 S. Ct. 2514, 2536 (1992) (Stevens, J., concurring in the judgment) (emphasis added). How likely is such a verdict, so clearly contrary to the evidence, to survive review in the normal course of state procedure, including proportionality review by the state supreme court? See N. C. Gen. Stat. § 15A-2000(d)(2). That possibility, *amicus* submits, is far too tenuous to justify the fundamental unfairness to the people of an *ex post facto* application of *McKoy* to judgments already final.

A writ of certiorari is needed in this case to establish a categorical rule that *none* of the post-*Gregg* fine tuning of capital sentencing procedure qualifies for the second *Teague* exception. "Bait and switch" jurisprudence causes enough damage on direct review. See *McKoy*, *supra*, 494 U. S., at 470, n. 5 (Scalia, J., dissenting). Its application to judgments already final is indefensible.

CONCLUSION

A writ of certiorari should be granted.

October, 1992

Respectfully submitted,

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